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# Supreme Court of the United States

October Term, 1945.

No. 1238

GEORGE F. FISH, INC. and MICHAEL SIMON,
*Petitioners,*

AGAINST

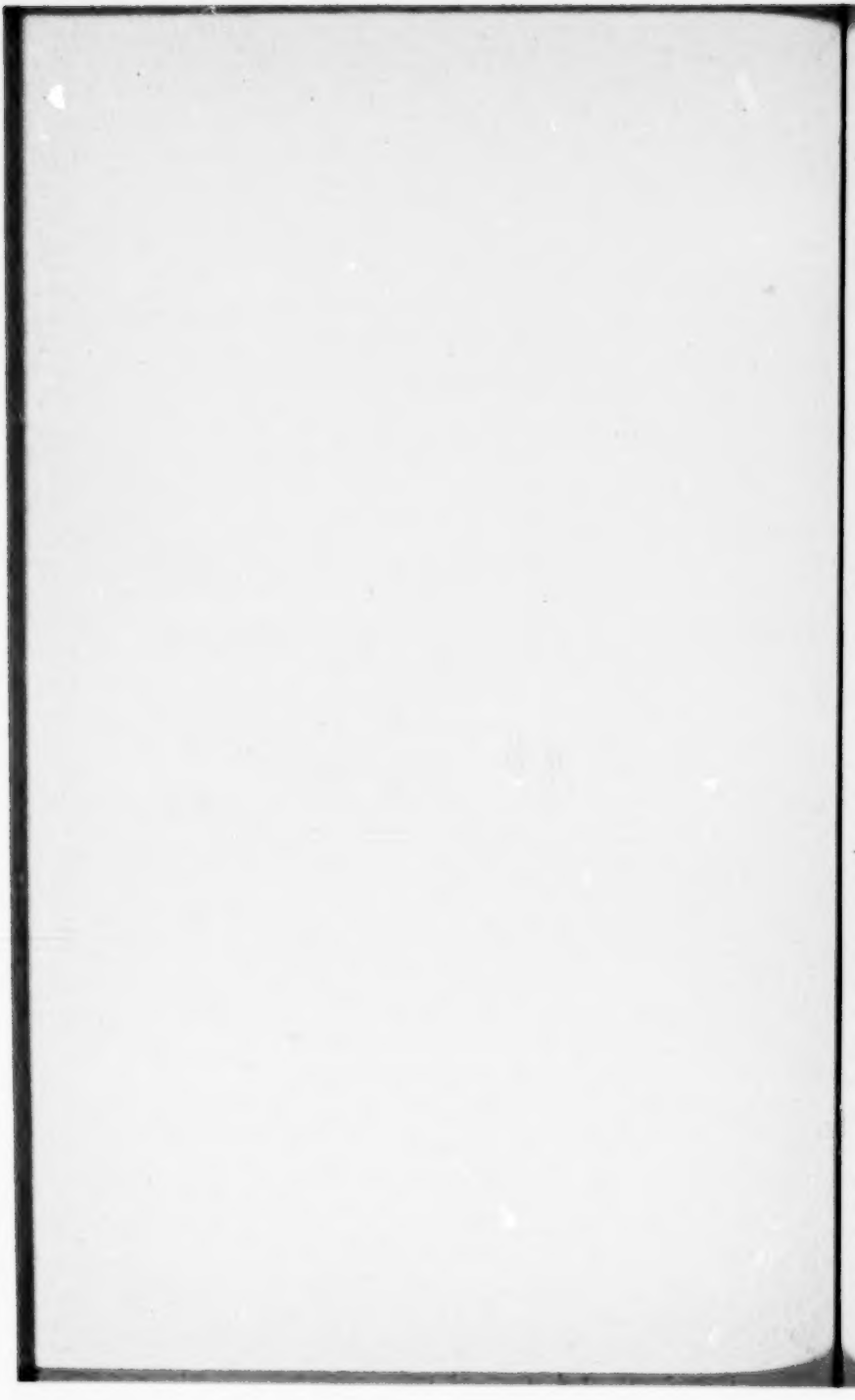
UNITED STATES OF AMERICA,
*Respondent.*

**Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.**

LEWIS F. GLASER,
67 Wall Street,
New York 7, N. Y.
*Attorney for Petitioners.*

LEWIS F. GLASER,
EDGAR F. SACHS,
*Of Counsel.*

LOEBB APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689



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# Supreme Court of the United States

OCTOBER TERM, 1945.

| | |
|---|---|
| GEORGE F. FISH, INC., and MICHAEL SIMON, *Petitioners,* | |
| AGAINST | No. ..... |
| UNITED STATES OF AMERICA, *Respondent.* | |

**Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.**

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, George F. Fish, Inc., a New York corporation, and Michael Simon, respectfully apply for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that Court entered February 8, 1946 (R. 221), affirming two judgments of the United States District Court for the Southern District of New York (R. 5, 6) entered after a jury verdict (R. 157) in a criminal prosecution for alleged violations of maximum price regulations issued under the authority of the Emergency Price Control Act of 1942, and from an order of the United States Circuit Court of Appeals for the Second Circuit, on a rehearing, entered April 26, 1946, reaffirming its original decision (R. 240). A certified copy of the record in the case, including the

proceedings in said Circuit Court of Appeals is furnished herewith in accordance with Rule 38, paragraph 1 of the Rules of this Court.

**Opinions Below.**

The District Court rendered no opinion. The opinions of the Circuit Court of Appeals are not yet reported. The opinion on the original appeal is found at R. 214 and the opinion upon the rehearing is found at R. 237.

**Jurisdiction.**

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C., Sec. 347 [a]) and as modified, pursuant to the Act of March 8, 1934 (18 U. S. C. Sec. 688), by Rule XI of the Rules of Practice and Procedure after verdict in criminal cases (292 U. S. 661, 666).

**Questions Presented.**

(1) Is the mere selling of lettuce, at the maximum price established by the Price Administrator under the Emergency Price Control Act of 1942, *in conjunction with* the sale of celery, broccoli or honeydew melons, upon which no ceiling price has been fixed, a criminal offense under the regulation of the Price Administrator which prohibits the evasion of established maximum prices by means of "tying-agreements", without defining such term, irrespective of whether the celery, broccoli or honeydew melons are sold at their established, current market price.

(2) Is the mere *conditioning* of the sale of lettuce, which is sold at the maximum price established by the Price Administrator under the Emergency Price Control Act of 1942, upon the purchase in conjunction therewith

of celery, broccoli or honeydew melons, for which no maximum prices have been established, a criminal offense under the Act and the regulation of the Price Administrator prohibiting the evasion of established maximum prices by "tying-agreements", without defining such term, irrespective of whether the celery, broccoli or honeydew melons are sold at their established, current market price.

(3) Does the mere inclusion by the Price Administrator, in the evasion section of a maximum price regulation, of the words "tying-agreement", without defining those words, establish as a criminal act, the sale of lettuce, at its established maximum price, *in conjunction with* the sale of celery, broccoli or honeydew melons, for which no maximum prices have been fixed, when the celery, broccoli and honeydew melons are sold at their established, current market price, particularly where the buyer involved had regularly, and for many years, purchased celery, broccoli and honeydew melons as separate items on numerous occasions, both prior to and subsequent to the transactions complained of.

(4) Does the mere inclusion by the Price Administrator, in the evasion section of a maximum price regulation, of the words "tying-agreement, without defining those words, establish as a criminal act, the *conditioning* of the sale of lettuce, at its established maximum price, upon the purchase in conjunction therewith of celery, broccoli or honeydew melons, for which no maximum prices have been fixed, when the celery, broccoli, and honeydew melons are sold at their established, current market price, particularly where the buyer involved had regularly purchased celery, broccoli and honeydew melons as separate items on numerous occasions, both prior to and subsequent to the transaction complained of.

(5) Does the mere inclusion by the Price Administrator, in the evasion section of the maximum price regulation under consideration, of the words "tying-agreement", without defining those words, distinguish the instant case from the holding of this Court in *M. Kraus & Bros., Inc.* v. *United States*, .... U. S. ...., decided March 25, 1946.

**Statute and Regulations Involved.**

The information charged violations of Regulations of the Price Administrator under the Emergency Price Control Act of 1942 (Title 50, Section 901 *et seq.*, United States Code) and the rules, regulations and orders duly adopted and issued thereunder.

Section 902 (a) authorizes the Price Administrator to establish by regulation maximum prices for commodities in furtherance of the purposes of the Act. Section 902 (g) authorizes him to make regulations which he deems necessary to prevent the circumvention or evasion of established maximum prices.

Section 902 (h) provides that such powers shall not be exercised "to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this act."

Section 904 makes it unlawful for any person to sell or deliver any commodity in violation of any regulation or order of the price Administrator under Section 902.

Pursuant to this authority, the Price Administrator fixed prices for fresh fruit and vegetables (Maximum Price regulation No. 426) and promulgated a regulation in connection therewith (Sec. 11 of Art. 1 of Sec. 1439.3), as follows:

> "Evasion. The price limitations which are set forth in this regulation shall not be evaded, whether

by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of or relating to fresh fruits or vegetables alone or in conjunction with any other commodity or by way of commission, service, transportation or any other charge or discount, premium or other privilege, or by tying agreement or other trade understanding or otherwise."

**Statement.**

Petitioner, George F. Fish, Inc., hereinafter referred to as the "corporation", is engaged in the fresh fruit and vegetable business in New York City as a commission merchant. It receives produce in carload lots from farmers and country shippers and and resells at wholesale to jobbers. The firm has been in business since 1883 (R. 113) with an unblemished record over that entire period (R. 182). Petitioner Simon was employed by the corporation as a salesman, and had been a salesman in the produce industry for over 40 years (R. 270).

The information herein (R. 2) contains three counts, each of them charging both petitioners with evading the provisions of Maximum Price Regulation 426, by requiring and compelling the purchase of a non-regulated commodity as the condition of the sale of a commodity regulated by M. P. R. 426.

At the conclusion of the trial, both petitioners were found guilty on all three counts (R. 157). The Court fined the corporate petitioner $1,500 on each count (R. 203). Petitioner Simon was sentenced to six months on each count, to run concurrently and sentence suspended (R. 199).

All three counts are in the same form. Each charges that petitioners, in connection with the sale of lettuce, the price of which was regulated by Maximum Price Regula-

tion 426, evaded the provisions of the regulation "by demanding, compelling and requiring" the purchase of another commodity (honeydew melons, broccoli and celery respectively) as a "condition of the sale * * * and as an integral part thereof, of the aforesaid lettuce".

It was conceded that in each case the lettuce was sold at the established ceiling price, and it was established by the undisputed testimony of an expert witness (R. 118-125), that in each case the secondary articles (none of which were regulated as to price) were sold at the established current market prices. It was also shown that the two purchasers involved dealt regularly in all three of the secondary commodities; that over a period of years, down to the very morning of the trial, they had been buying the secondary commodities alone as separate items (R. 27, 29, 174).

The Government's testimony as to compulsion was denied by Simon who testified clearly and unequivocally that there was no pressure on his part to induce the sale of the secondary commodities, that is, celery, melons and broccoli. He categorically denied compelling any customers to purchase any commodities they did not want at any time and supported the statement of Mr. Fish, the secretary and treasurer of the corporate petitioner, that such were the strict instructions of the firm (R. 94).

The testimony of the Government's witnesses was very meagre and indeed the District Judge characterized the case as "close" (R. 171). At the conclusion of the Government's case, at the end of the case and before sentence, the various motions of the petitioners to dismiss, for a directed verdict and in arrest of judgment, were denied (R. 86, 143, 176).

**Specifications of Errors to Be Urged.**

The Circuit Court of Appeals for the Second Circuit erred:

(1) In holding that verdicts ought not to have been directed by the trial court in favor of petitioners.

(2) In holding that the jury was justified in finding, beyond a reasonable doubt, that petitioners were guilty of the offenses alleged in the counts set forth in the information.

(3) In substantially holding that under the evidence, petitioners resorted to an illegal device to evade the maximum price ceilings upon fresh fruits and vegetables.

**Reasons for Granting the Writ.**

The recent decision of this Court in *M. Kraus & Bros. Inc.* v. *United States,* ..... U. S. ....., decided March 25, 1946, has left considerable doubt and uncertainty insofar as it effects regulations in other industries as to the scope and extent of its ruling. This is borne out by the doubt as to its meaning expressed by the United States Circuit Court of Appeals for the Second Circuit in its opinion written upon the rehearing in the instant case (R. 238, 239).

The evasion section of M.P.R. 426 (Sec. 11, of Article I of Sec. 1439.3) employs the exact language as that before this court in the *Kraus* case (Sec. 1429.5 of R.M.P.R. 269) except that in M.P.R. 426 the Administrator added the words "tying-agreement", to the list of methods which could not be employed for evasive purposes.

In all four opinions of this Court in the *Kraus* case, the terms "sale in conjunction", "combination sale", and "tying agreement" are used interchangeably. This Court held that the Administrator had the power to prohibit

sales of this character absolutely, that he did so specifically and in unmistakeable terms in certain regulations, e. g., in the case of meat and clothing.* Having done so in some instances and not in others, he must be presumed to have intended a different meaning where he used other language. It has now been established beyond cavil that a regulation which does not clearly and unambiguously set forth such a prohibition cannot be made the basis of a criminal prosecution.

In the meat and clothing regulations the Administrator left no doubt as to his meaning. In both of those regulations there is a prohibition against the sale of a regulated commodity "on condition that the purchaser is required to purchase some other commodity". As this Court said, the very definiteness with which tying agreements of all types were prohibited in regard to those commodities, and the absence of such express prohibition in other regulations might well lead a reasonable man to believe that tying agreements were permissible under certain circumstances, where such explicit language was not used. So, in the *Kraus* case this Court construed the applicable regulation as prohibiting only those tying agreements involving secondary products that are worthless or that are sold at artificial prices.

It is submitted that the same reasoning must apply in the instant case. Since the Court used the words "combination sales" and tying agreements" interchangeably, it cannot be argued that the mere inclusion of the words "tying agreement", without definition, in M.P.R. 426 adds anything to the language used in the poultry regulation. Surely the mere inclusion of those words does not satisfy the requirement of explicitness laid down by this Court in the *Kraus* case.

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*For meat regulation see Sec. 1464.406, R.M.P.R. 169 as amended Mar. 30, 1943, 8 Fed. Reg. 4099. Re clothing regulation see Sec. 15 R.M.P.R. 287 issued June 29, 1943, 8 Fed. Reg. 9126. See also Sec. 1389.555, M.P.R. 330, as amended August 7, 1943, 8 Fed. Reg. 11041.

The evasion section here in question lists *seventeen* separate methods by which evasion must not be accomplished, but it does not prohibit, absolutely, the use of any one of those methods. The section includes, among others: offer, solicitation, agreement, sale, delivery, purchase, tying agreement. Obviously, it cannot be contended seriously that all of those acts are prohibited *per se*. That would be tantamount to arguing that all offers to sell and all sales of fresh fruits and vegetables are prohibited. It would appear that these acts are prohibited only when employed as a method of evasion. If this is true of the others, it must also be true of tying agreements.

In the *Kraus* case, although the words tying agreement" were omitted from the regulation, nevertheless, this Court held that tying agreements were prohibited where the purchaser was required to buy a wholly worthless commodity or a second commodity at an excessive price as the condition of the sale of a regulated commodity. It is submitted that the mere inclusion of the words "tying agreement" does not change the plain meaning of the regulation.

It was established upon the trial herein by testimony of an official of the Office of Price Regulation (R. 81) that the term "tying agreement" has never been defined by the Price Administrator. Surely in the absence of such definition no more can be read into the section by inclusion of the term "tying agreement" than can be done in its omission. In neither case is there the definite and unmistakable prohibition contained in the clothing and meat regulations and in neither case is there the clear expression of the elements of evasive conduct required to bring the criminal penalties of the Emergency Price Control Act into operation.

A reading of the regulations in the clothing and meat industries, cited by this Court as instances in which the Price Administrator specifically prohibited tying agree-

ments *per se*, will show beyond doubt that even the Price Administrator, himself, did not intend, by the inclusion of the term "tying agreement" in an evasion section, to establish an absolute prohibition against the use of combinaiton or tie-in sales under all circumstances. In both of those regulations, under the heading "prohibitions" he set forth the injunction against conditioning the sale of one commodity upon the purchase of another. But each of those regulations also contains an evasion section which sets forth, verbatim, the exact language of that now before this Court, including the words "tying agreement". Obviously there would have been no reason or necessity for this specific prohibition if the evasion section alone had been intended as a ban on such sales *per se*. It is submitted there is no magic connotation to the words "tying agreement". Standing by themselves, in an evasion section, they do not, *ipso facto*, satisfy the requirements laid down by this Court for the definition of criminal conduct. As Mr. Justice Murphy held in the *Kraus* case:

> "the elements of evasive conduct should be so clearly expressed by the Administrator, that the ordinary person can know in advance, how to avoid an unlawful course of action."

The prevailing opinion in the *Kraus* case made it clear that it was in the mind of the Administrator to prohibit only those tying agreements involving secondary commodities that were worthless or sold at artificial prices.

Mr. Justice Black in his opinion in the now famous case of *Williams et al* v. *North Carolina*, 325 U. S. 266, said:

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning, and differ as to its application, violates the first essentials of due process of law."

The uncertainty of the language used in the regulation under question made every reputable merchant a potential criminal. Unfortunately, the decision in the *Kraus* case has not clarified the situation sufficiently and it is still, as the Circuit Court of Appeals held on the application for rehearing, doubtful whether the mere inclusion of the words "tying agreement" differentiates those regulations containing that term from the regulation before the Court in the *Kraus* case.

With the continuing scarcity of foods and other commodities, the exact meaning of these regulations becomes a matter of great public importance. Many reputable business men are subject to prosecution for acts which they sincerely believe to be legal and proper. A large number of informations and indictments are pending throughout the country which turn upon the very question now raised and it is hoped that this Court may see fit to clarify the existing uncertainty.

## CONCLUSION.

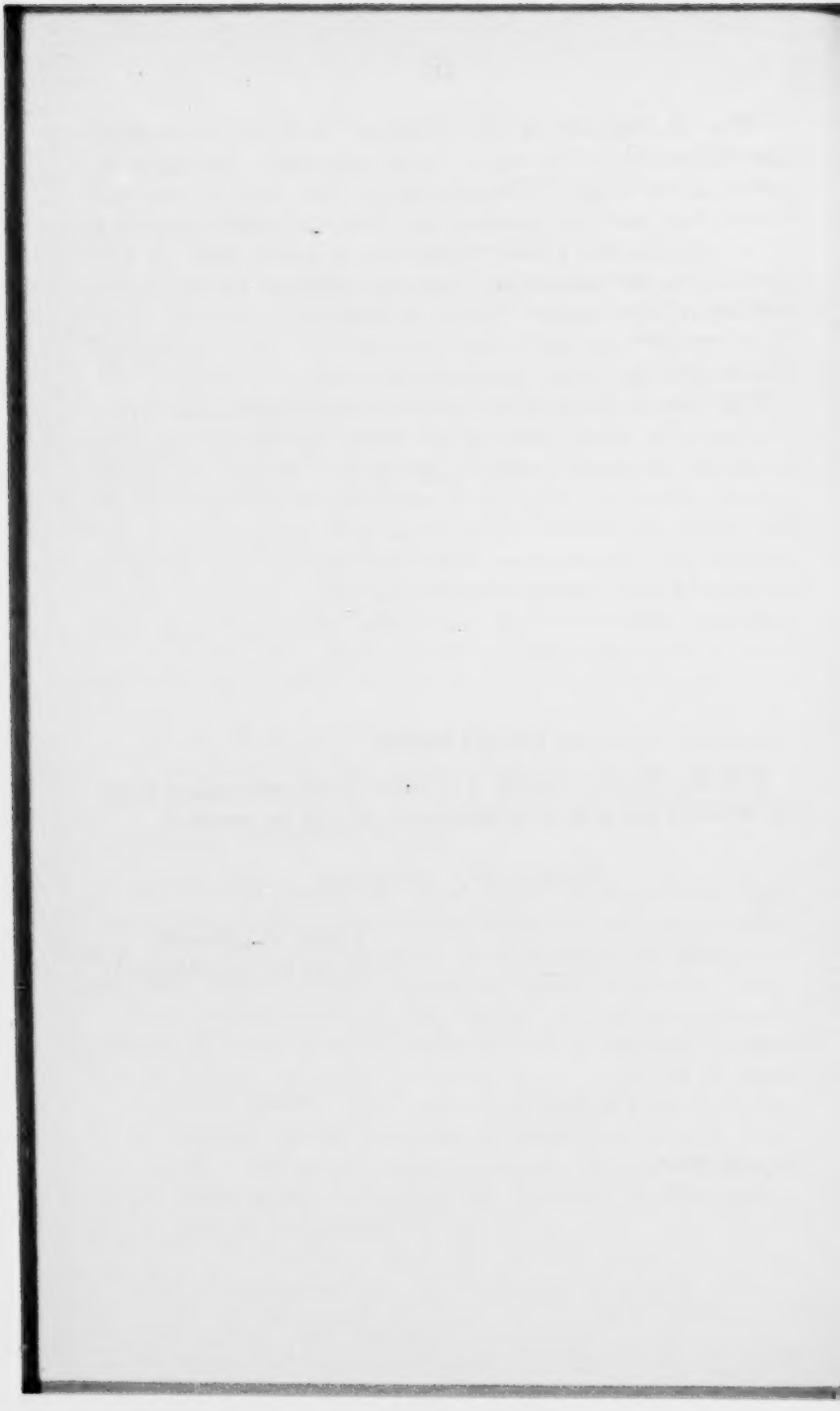
**For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.**

Respectfully submitted,

LEWIS F. GLASER,
*Attorney for Petitioners.*

LEWIS F. GLASER,
EDGAR F. SACHS,
*Of Counsel.*

May 20, 1946.



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No. 1238

# In the Supreme Court of the United States

OCTOBER TERM, 1945

GEORGE F. FISH, INC. AND MICHAEL SIMON,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. 901, *et seq.*)

Maximum Price Regulations:

No. 169

No. 330

No. 426

Miscellaneous:

O. P. A. Service (Pike and Fisher), Vol. I, p. 2: 812




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# In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1238

GEORGE F. FISH, INC. AND MICHAEL SIMON,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The original opinion of the Circuit Court of Appeals (R. 214–219) and its opinion upon rehearing (R. 230–231) have not yet been reported.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 8, 1946 (R. 219), and was reaffirmed on rehearing on April 26, 1946 (R. 232). The petition for a writ of certiorari was filed on May 16, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Feb-

ruary 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

### QUESTION PRESENTED

Whether a regulation which expressly prohibits evasion by tying agreements was violated by sales of a regulated commodity at ceiling price on condition that the purchasers buy secondary commodities.

### STATUTE AND REGULATION INVOLVED

The Statute and Regulation involved are the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. § 901 *et seq.*) and Maximum Price Regulation No. 426 (8 F. R. 9546) issued under Section 2 (a) of that Act. The applicable sections of the Regulation provide:

> § 7. *Prohibition against sales above maximum prices.*—On and after July 20, 1943, regardless of any contract or other obligation, no person shall sell or deliver and no person, in the course of trade or business shall buy or receive fresh fruits and vegetables at prices higher than the maximum prices established by this regulation, and no person shall agree, offer, solicit, or attempt to do any of the foregoing. Lower prices than the maximum prices may be charged or paid.
>
> § 11. *Evasion.*—The price limitations which are set forth in this Regulation shall not be evaded, whether by direct or indirect

methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of or relating to fresh fruits or vegetables alone or in conjunction with any other commodity or by way of commission, service, transportation or any other charge or discount, premium or other privilege, or by tying-agreement or other trade understanding or otherwise.

STATEMENT

An information in three counts was returned against petitioners in the United States District Court for the Southern District of New York. Each count charged that in connection with the sale of lettuce, the price of which was regulated by Revised Maximum Price Regulation No. 426 (hereinafter referred to as M. P. R. 426), petitioners unlawfully, wilfully, and knowingly evaded the regulation by demanding, compelling, and requiring the purchaser to buy an additional commodity "as a condition of the sale to him, and as an integral part thereof, of the aforesaid lettuce." The additional commodity specified in count 1 was honeydew melons; in count 2, broccoli; and in count 3, celery (R. 1–4).

The evidence for the Government may be summarized as follows:

The petitioning corporation is a wholesaler of fruits and vegetables; i. e., it receives produce in carload lots and sells at wholesale. Petitioner

Simon was employed by the corporation as a salesman (R. 90–91).

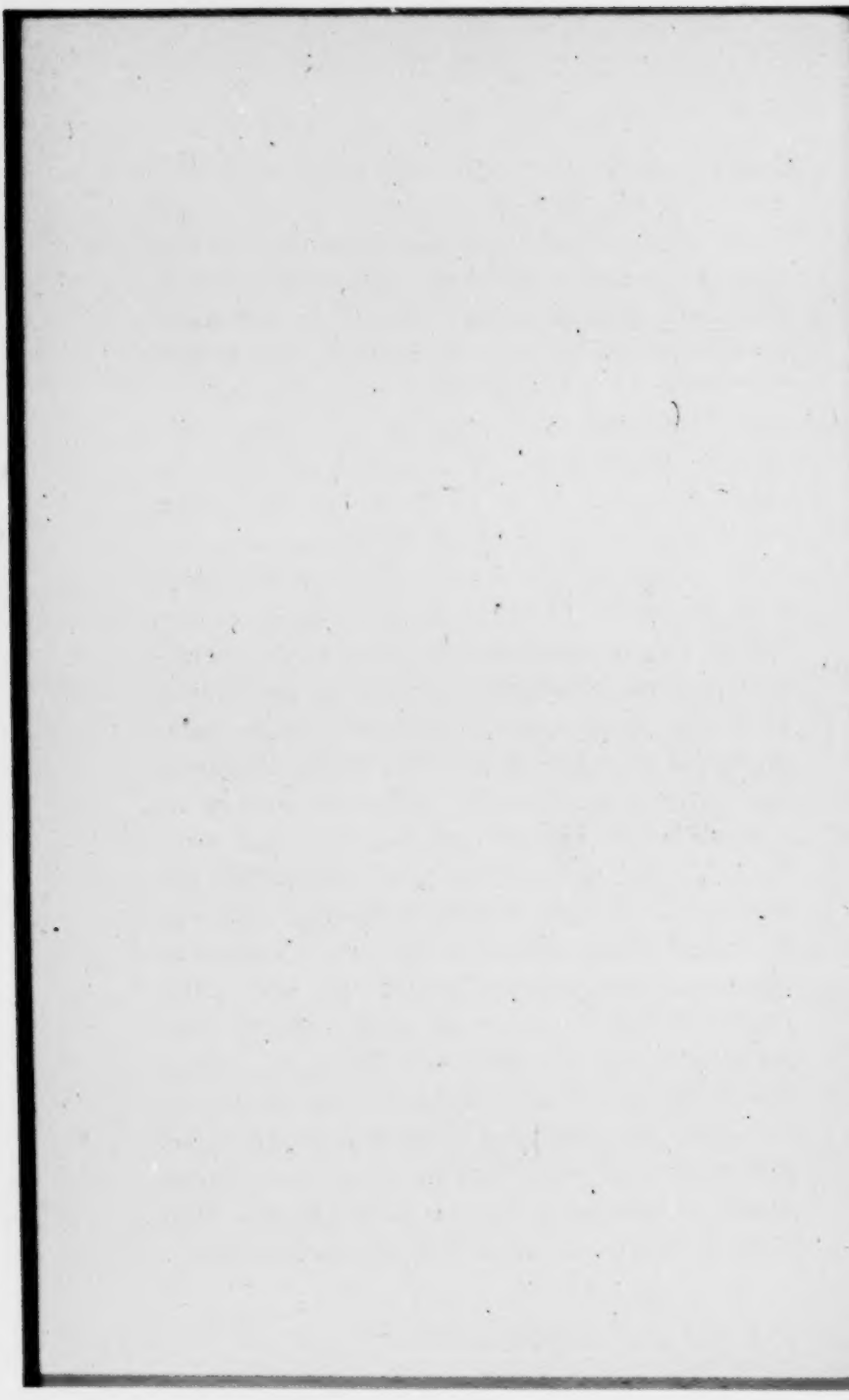
In November 1943, there was a scarcity of lettuce (R. 41, 125). On November 17, 1943, the Government witness Fierro, a dealer in fruit and produce, asked Simon for lettuce (R. 43, 45). Simon replied that if Fierro took melons he would give him lettuce, but would not sell him lettuce without the melons (R. 47). Fierro then purchased ten crates of melons at $4.75 a crate and received four crates of lettuce for which he was charged the ceiling price of $5.29 per crate (Ex. 3; R. 47, 204; R. 78–79). The market price of the melons was $4.75 (R. 120), but the market in melons was dull (R. 122).

On November 19, Fierro again asked Simon for lettuce, and Simon replied that he would give him lettuce if Fierro took some broccoli. Fierro said that he could not use broccoli that day, but Simon told him he could not get the lettuce without the broccoli. (R. 49–50.) Fierro then purchased five crates of broccoli for $35 and received five crates of lettuce for which he was charged the ceiling price (Ex. 4; R. 49, 205). The market price on this type of broccoli ranged from $6.50 to $8.00, depending on quality (R. 120). Fierro sustained a loss of $15 in reselling the broccoli (R. 72–74).

On November 27, the Government witness Zwerdling asked Simon for five crates of lettuce. Simon replied, "You have to help me out on

celery because I have too much celery on hand." Zwerdling said that he could not use celery and could get it somewhat cheaper elsewhere, but that if he had to take it, he would. Simon said Zwerdling could get the lettuce only if he purchased celery (R. 19–22, 25). Zwerdling then bought five crates of celery at $5.09 per crate and received five crates of lettuce at the ceiling price (Ex. 1; R. 25, 204). The market price of the celery ranged from $3 to $5.50, but the market was dull on November 27 (R. 120–121).

In submitting the case to the jury, the judge read Section 11 of M. P. R. 426 (*supra*, p. —), defined "tie-in agreement" as used in the regulation as "an agreement by which a prospective purchaser of a commodity regulated by the price regulation is required, in order to get that commodity, to purchase some other commodity as a condition of the sale of the regulated commodity," and charged the jury that petitioners were guilty if they compelled the purchasers to buy other commodities in order to get lettuce, as charged in the information (R. 152–153). The jury returned a verdict of guilty against both petitioners on all three counts (R. 157). Simon was sentenced to imprisonment for six months on each count, the sentences to run concurrently, but execution of sentence was suspended and Simon placed on probation for one year (R. 6). The corporation was fined $1,500 on each count (R. 5).



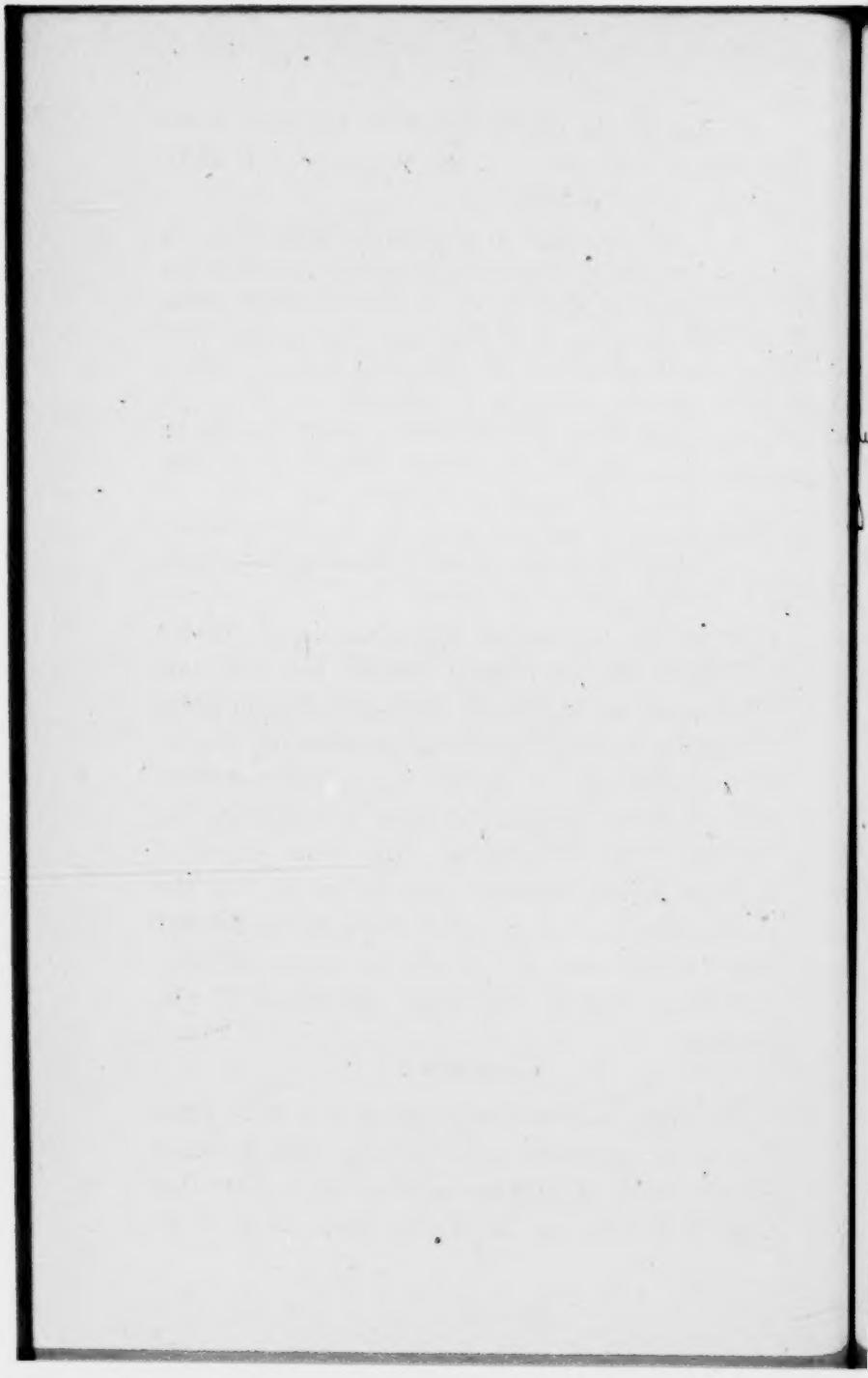
On appeal, the Circuit Court of Appeals for the Second Circuit affirmed the judgment (R. 219), stating (R. 216–217):

> A rationed item cannot be said to be actually sold at ceiling when, although the price quoted on it is the maximum legal price, there is at the same time an enforced sale of an unrationed commodity. It seems obvious to us, as it certainly would to the consuming public, that when a customer who desires to obtain lettuce must buy honeydew melons, broccoli, or celery in order to get it, he gives a consideration above and beyond that fixed by the maximum price regulation.

After the decision of this Court in *M. Kraus and Bros. Inc.* v. *United States,* No. 198, this Term, decided March 25, 1946, the circuit court of appeals granted a petition for rehearing to consider petitioners' contention that the *Kraus* decision required reversal of their convictions (R. 220–225, 232). Thereafter, the circuit court of appeals again affirmed the judgment on the ground that the regulation involved in the present case "unlike that in the *Kraus* case, expressly prohibited evasion 'by tying agreement,'" (R. 230–232).

## ARGUMENT

The decision of the court below is clearly right and is in accord with the decision of two other circuit courts of appeals handed down since this Court's decision in the *Kraus* case. *Coffin-Red-*



*ington Co.* v. *Porter* (C. C. A. 9), decided May 22, 1946; *Bowles* v. *Cudahy Packing Co.* (C. C. A. 3), decided March 29, 1946. Petitioners argue that, despite the fact that the regulation here involved specifically forbids evasion of maximum prices by "tying agreements," their convictions for compelling tie-in sales cannot stand under the decision of this Court in *M. Kraus & Bros. Inc. v. United States, supra,* (Pet. 7–11). This argument disregards the fact that this Court based its decision in the *Kraus* case on the absence of a specific prohibition against tying agreements in the poultry regulation (M. P. R. 269) there involved. This Court recognized that for the purposes of enforcement proceedings, it must be assumed that the Administrator legally could include tying agreements involving the sale of valuable secondary commodities at their market value among the prohibited evasion devices, but held that in the poultry regulation the Administrator had not adequately expressed his intention to do so. Noting that the pertinent provision of the poultry regulation provided simply "that price limitations shall not be evaded by any method, direct or indirect, whether in connection with any offer or sale of a price-regulated commodity alone 'or in conjunction with any other commodity,' or by way of any trade understanding 'or otherwise,' " the opinion of Mr. Justice Murphy then stresses that "No specific mention is made of tying agreements or combination sales" (Slip opinion, p. 6).

The omission upon which the decision in the *Kraus* case turned was supplied in the fresh fruits and vegetables regulations, M. P. R. 426, here involved. In pertinent part the evasion clause of that regulation provides that "the price limitations which are set forth in this Regulation shall not be evaded * * * by tying agreements * * *" (Section 11). As the court below stated (R. 231), the provision thus meets the requirement of the *Kraus* decision for an explicit statement of the Administrator's intent to include tying agreements among the prohibited evasive devices without regard to the value of the secondary commodity. All persons subject to the regulation were plainly informed that the imposition of a "tying" requirement was conduct which was considered evasive so as to bring the criminal penalties of the Act into operation. One who examined this and other regulations and compared them could not draw the inference which was open in connection with the regulation in the *Kraus* case that, because of the presence of an express prohibition of tie-in sales in some regulations and its absence from the regulation there involved, such sales were not *per se* illegal under that regulation. Here there is express mention of tying agreements. Sellers have been told, not simply that they may not evade through sales of price-regulated commodities "in conjunction with any other commodity," but that they may not evade by means of a "tying agreement."

Petitioners argue that the words "tying agreement" have no clear meaning and hence that their inclusion in the present regulation adds nothing to the clause before this Court in the *Kraus* case (Pet. 8, 9). As the opinion in the *Kraus* case states, however, the practice of requiring the purchase of one commodity as a necessary condition to the purchase of another is "commonly known as a 'combination sale' or a 'tying agreement.' "[1] Furthermore, the Price Administrator has consistently described tying agreements as meaning the compelled sale of a secondary commodity, even where that commodity has value and is sold at the market price. (See, e. g., the interpretation referred to in footnote 6 of the *Kraus* decision; OPA Service (Pike and Fisher), Vol. I, p. 2:812.) The testimony at the trial shows that petitioners were aware that the Office of Price Administration had so interpreted tying agreements and that it deemed such a practice illegal (R. 117–118).

Petitioners further argue that tying agreements are not forbidden *per se* because the regulation prohibits evasion by other methods, such as offer, solicitation, etc., which clearly are not in themselves illegal (Pet. 9). This argument is based on the

[1] Petitioners point to the fact that the opinion of this Court uses the terms "combination sale" and "tying agreement" interchangeably as support for their contention that the term "tying agreement" adds nothing to the language of the clause before this Court in the *Kraus* case (Pet. 9). There was, however, no specific prohibition in that regulation of either tying agreements or combination sales.

erroneous assumption that all ~~methods of evasion~~ these terms are listed in the regulation without differentiation. The regulation is not so phrased. The words "tying agreement" in Section 11, the evasion section, are not part of the phrase in which the other listed terms are used. The section provides that the price limitations "shall not be evaded * * * *in connection with* any offer, solicitation, agreement, sale, delivery, purchase, or receipt of * * * vegetables alone or in conjunction with any other commodity, * * * *or by* tying agreement." [Italics supplied.] It is thus clear that while, of course, offers of sale or sales are not *per se* forbidden by this clause, evasion by tying agreements is expressly prohibited.

Maximum Price Regulations 169,[2] § 1364.406, 287,[3] § 15, and 330,[4] § 9, relating to other products, do, as petitioner states, specifically prohibit conditioning the sale of one commodity upon the purchase of another, as well as evasion by means of tying agreements. However, the fact that the Administrator has twice included the admonition in some regulations does not mean that it should be disregarded where it is stated clearly once. As the structure of the regulations demonstrates, the additional clauses are part of a series which elaborates upon and illustrates types of evasive conduct already prohibited. Thus, § 1364.406 of Regulation 169, in

[2] 8 F. R. 4099.
[3] 8 F. R. 9126.
[4] 8 F. R. 11041.

subsection (a), prohibits evasion by tying agreement and other devices, and then subsection (b) continues:

> (b) Specifically, but not exclusively the following practices are prohibited:
>
> * * * * *
>
> (5) offering, selling, or delivering beef or veal on condition that the purchaser is required to purchase another meat item or items or any other commodity.

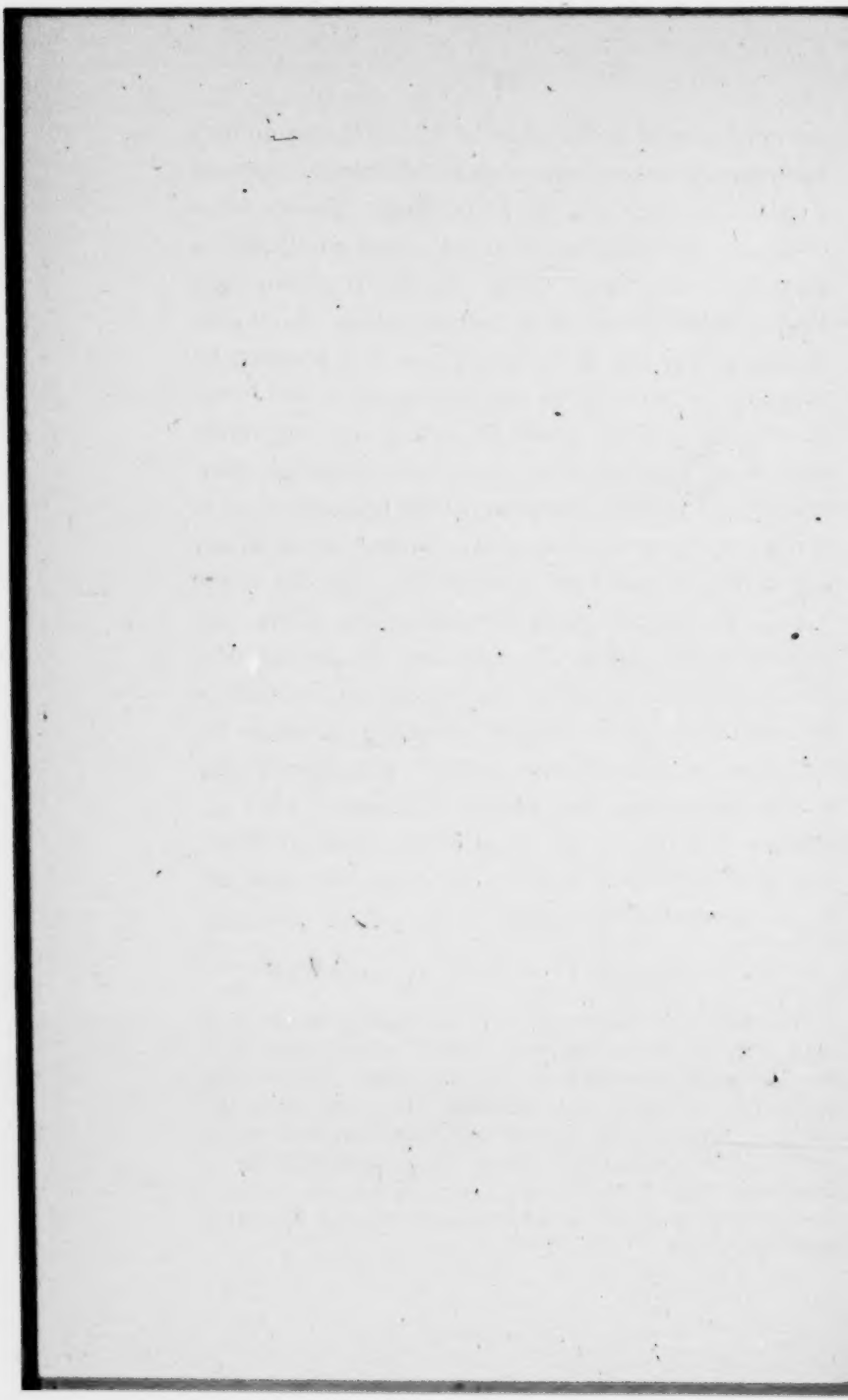
Tying agrements are not the only evasive devices which are twice prohibited by this section. Thus, for example, subsection (a) forbids evasions by means of transportation charges, and paragraph (b) (6) prohibits making a charge for delivery on the basis of a route different from that actually followed. Again, subsection (a) forbids evasion by means of service charges, and then a paragraph of subsection (b) repeats that a seller may not charge for any service for which a specific allowance is not provided by regulation ~~(b) (8)~~. These illustrative provisions do not add to the previous prohibitions, nor does their absence from the regulation here involved serve to differentiate it from the regulations cited.

This Court in the *Kraus* case recognized that the Administrator could prohibit tie-in sales as evasions of maximum prices, even if the secondary commodity has value and is sold at the ceiling price. The reason why the Administrator considered all such arrangements evasive violations

without regard to the price at which the secondary commodity is sold, and prohibited them to prevent profiteering is not hard to find. Tie-in sales create an artificial demand for other commodities and force additional sales. In terms of contract law, a seller receives a consideration above the ceiling price, for the primary product because he receives, in addition to the ceiling price, the benefit of making a sale which he would not have made except as consideration for the regulated commodity. The very purpose of the imposition of a tying requirement is to obtain some benefit which could not be obtained without it. By the same token, the buyer pays consideration above the ceiling price, since, in addition to paying the maximum prescribed by the regulation, he suffers the additional detriment of making a purchase he otherwise would not have made.[5] This Court held in the *Kraus* case that the prohibition of such an evasive practice in the regulation there involved was not sufficently explicit to meet the rule of strict construction applied to penal statutes.

[5] In *Coffin-Redington Co.* v. *Porter* (C. C. A. 9), decided May 22, 1946, the court said:

"The first objection urged is to the finding of the trial court that distilled spirits were sold at prices higher than the maximum permitted by the regulation, whereas the parties had stipulated that 'each item, itself, was within the ceiling.' However, the court found that there were tying agreements or combination sales in violation of § 7.8 (b) of Regulation 445. If this finding has support in the evidence, then the finding of sales at prices in excess of those allowable logically follows. * * *"



That deficiency is met by the present regulation which, in express terms, prohibits evasion by "tying agreements." The court below therefore properly concluded that the decision in the *Kraus* case did not affect the validity of petitioners' convictions.

## CONCLUSION

The decision below is correct, and is in accord with the decision of this Court in *M. Kraus & Bros. Inc.* v. *United States.* We therefore respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
*Solicitor General.*
THERON L. CAUDLE,
*Assistant Attorney General.*
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
*Attorneys.*
GEORGE MONCHARSH,
*Deputy Administrator for Enforcement, Office of Price Administration*
MILTON KLEIN,
*Director, Litigation Division.*
IRVING M. GRUBER,
*Attorney.*

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